



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office Of Inspector General
Office Of Audit Services

Region II
Jacob K. Javits Federal Building
26 Federal Plaza
New York, NY 10278

September 26, 1997

Our Reference Common Identification No. A-02-95-02006

Mr. Brian J. Wing
Commissioner
New York State Department
of Family Assistance
40 North Pearl Street
Albany, New York 12243

Dear Mr. Wing:

Enclosed are two copies of the U.S. Department of Health and Human Services (HHS), Office of Inspector General (OIG), Office of Audit Services' (OAS') report entitled "Review of Legal and Administrative Costs Incurred by the New York State Department of Social Services and by the New York State Department of Law on Behalf of the New York State Department of Social Services." A copy of this report will be forwarded to the action official below for his review and any action deemed necessary.

Final determination as to actions taken on all matters reported will be made by the HHS action official named below. We request that you respond to the HHS action official within 30 days from the date of this letter. Your response should present any comments or additional information that you believe may have a bearing on the final determination.

In accordance with the principles of the Freedom of Information Act (Public Law 90-23), OIG, OAS reports issued to the Department's grantees and contractors are made available, if requested, to members of the press and general public to the extent information contained therein is not subject to exemptions in the Act which the Department chooses to exercise. (See 45 CFR Part 5.)

Page 2 - Mr. Brian J. Wing

To facilitate identification, please refer to Common Identification Number A-02-95-02006 in all correspondence related to this report.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Timothy J. Horgan", with a long horizontal flourish extending to the right.

Timothy J. Horgan
Regional Inspector General
for Audit Services

Enclosures

Direct Reply to HHS Action Official:

Mr. Vincent Bamundo
Director, Division of Cost Allocation
Department of Health and Human Services
26 Federal Plaza Room 41-122
New York, NY 10278

Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

**REVIEW OF LEGAL AND
ADMINISTRATIVE COSTS
INCURRED BY
THE NEW YORK STATE DEPARTMENT
OF SOCIAL SERVICES
AND BY
THE NEW YORK STATE DEPARTMENT
OF LAW ON BEHALF OF
THE NEW YORK STATE DEPARTMENT
OF SOCIAL SERVICES**



**JUNE GIBBS BROWN
Inspector General**

**SEPTEMBER 1997
A-02-95-02006**



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office Of Inspector General
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Mr. Brian J. Wing
Commissioner
New York State Department
of Family Assistance
40 North Pearl Street
Albany, New York 12243

Dear Mr. Wing:

This report provides you with the results of our review of the legal and related administrative costs incurred by the New York State Department of Social Services (NYSDSS) and by the New York State Department of Law (NYSDOL) on behalf of NYSDSS. This review was requested by the Department of Health and Human Services (DHHS), Division of Cost Allocation (DCA). The primary objectives of our review were to determine if the legal and administrative costs allocated to Federal programs in the period April 1, 1990 through June 30, 1995 were reasonable, allocable and allowable. In addition, DCA requested we verify that New York State did not claim the legal and administrative costs relating to its December 20, 1994 training contract settlement agreement with the Department of Justice, the Office of Inspector General, and DCA.

SUMMARY

In general, we found that the legal and administrative costs claimed for Federal reimbursement by NYSDSS in our audit period were allowable as claimed. Although we found that both NYSDSS' Bureau of Deferrals and NYSDOL's Affirmative Litigation Unit incurred costs which are unallowable for Federal reimbursement, we are not recommending any financial adjustments for costs claimed in our audit period as discussed in the Findings and Recommendations section of this report. However, we are recommending that NYSDSS refund \$1,334,849 (\$593,174 Federal share) for claimed costs which related to a Memorandum of Understanding (MOU) between NYSDSS and NYSDOL. In our opinion, NYSDSS' claiming of the MOU costs circumvented a prior

agreement between DCA and NYSDOL and also was contrary to the cost principles contained in Office of Management and Budget Circular No. A-87. We further found that the MOU costs included expenses which are not eligible for Federal financial participation. Our recommended adjustment is discussed in more detail in the Findings and Recommendations section.

Lastly, we found that NYSDSS had properly adjusted its Central Office Cost Allocation Claim (COCAC) for the legal and administrative costs which related to the December 20, 1994 settlement agreement.

We are recommending that the NYSDSS refund \$1,334,849 (\$593,174 Federal share), and that NYSDSS calculate and refund legal and administrative costs claimed under the MOU for the period subsequent to our review.

AUDITEE COMMENTS

The State did not concur with our recommendation to refund \$593,174 to the Federal Government for improper claims identified under the MOU for the period April 1, 1993 to June 30, 1995. Also, the State did not comment on the report's recommendation that NYSDSS calculate and refund legal and administrative costs claimed under the MOU for the period subsequent to our review. The State's written comments are appended in their entirety as Appendix A to the report.

INTRODUCTION

Background

Office of Management and Budget Circular No. A-87, Attachment B, section 14.b., stipulates that "Legal expenses required in the administration of Federal programs are allowable" and that "Legal expenses for prosecution of claims against the Federal Government are unallowable."

For purposes of our review, we interpreted the above provision to mean that legal and related administrative costs incurred through the administrative appeals process up to the Departmental Appeals Board (DAB) are allowable. And, the legal and related administrative costs incurred subsequent to a DAB decision, through the judicial appeals process are unallowable.

The NYSDSS' Bureau of Deferrals and Disallowances handles the prosecution of claims against the Federal Government through the administrative appeals process. This Bureau is functionally located within the NYSDSS' Division of Legal Affairs (DLA). The

Bureau's expenses are claimed for Federal reimbursement by NYSDSS through an approved allocation methodology set forth in the Central Office Cost Allocation Plan.

Subsequent to the issuance of a DAB decision, the further prosecution of claims against the Federal Government, through the judicial appeals process, is handled primarily by NYSDOL or by the private law firm of Covington and Burling. Within the NYSDOL, the Affirmative Litigation Unit handles the prosecution of claims against the Federal Government. This Unit is functionally located within the NYSDOL's Office of State Counsel as part of the Bureau of Litigation-New York City. The legal and related administrative costs for the Affirmative Litigation Unit are claimed for Federal reimbursement through an approved methodology set forth in the Statewide Cost Allocation Plan. The NYSDSS' Bureau of Deferrals and Disallowances provides some assistance to NYSDOL during the judicial appeals process.

On December 20, 1994, the State of New York signed an agreement with the Department of Justice (DOJ), the Office of Inspector General (OIG), and DCA which settled a number of issues identified during a review of training costs claimed by the NYSDSS during the period April 1, 1983 to June 30, 1994. Under the terms of the settlement, the State agreed that it would not claim any legal or administrative costs incurred during its own investigation of training cost issues.

Scope

Our review was conducted at the request of DCA. The primary objectives of our review were to determine if the legal and administrative costs allocated to Federal programs in the period April 1, 1990 through June 30, 1995 were reasonable, allocable and allowable. Further, DCA requested that we verify that NYSDSS did not claim the legal and administrative costs associated with its own investigation and resolution of the training cost issues finalized in the December 20, 1994 settlement agreement with DOJ, OIG, and DCA.

To accomplish our objectives, we:

- * Held discussions with NYSDSS and NYSDOL officials regarding the organizational structure and workload assignments of its legal staff.
- * Identified a universe of legal cases that NYSDSS's Bureau of Deferrals and Disallowances worked on during the period April 1, 1990 to June 30, 1995.
- * Determined the percentage of time spent by the Bureau of Deferrals and Disallowances on cases relating to the prosecution of claims against the Federal Government during the judicial appeals process.

- * Calculated an estimate of the Bureau of Deferrals and Disallowances' costs which related to the prosecution of claims against the Federal Government during the judicial appeals process.
- * Obtained the documentation relating to the costs incurred by NYSDSS for services provided by the firm of Covington and Burling and ascertained whether these costs were claimed for Federal reimbursement.
- * Compared the costs associated with the attorneys in NYSDOL's Affirmative Action Unit who provide assistance to NYSDSS with the amount of NYSDOL's costs which are excluded from the SWCAP by DCA.
- * Held discussions with cognizant NYSDSS and NYSDOL officials concerning the terms of an MOU which relates to the defense of Medicaid eligibility determinations. Determined the nature of the costs associated with the MOU and traced the costs to NYSDSS' claims for Federal reimbursement.
- * Reviewed the propriety of NYSDSS' \$328,519 adjustment to the COCAC for all legal and related administrative costs claimed in connection with the December 20, 1994 settlement agreement.

Our review was conducted in accordance with generally accepted government auditing standards with the exception that we did not perform an in-depth review of NYSDSS' internal control structure. The objectives of this financial related audit did not require an understanding or assessment of the internal controls.

We conducted our field work at NYSDSS in Albany, New York during the period September 1995 through June 1996.

FINDINGS AND RECOMMENDATIONS

Generally, we found that the legal and related administrative costs which NYSDSS claimed for Federal reimbursement during our audit period were allowable as claimed except as discussed below. We further found that NYSDSS had properly credited its COCAC for the legal and administrative costs which related to the December settlement agreement.

NYSDSS Bureau of Deferrals and Disallowances

The Bureau of Deferrals and Disallowances did not have time reports available for our audit period which would identify the percentage of time its attorneys spent on administrative or judicial appeals cases. In the absence of time reports, we reviewed the Bureau's case load for the period of our audit. Of the total of 232 cases reviewed, we found that only 16 involved cases appealed beyond the issuance of a DAB decision. The 16 cases equated to approximately 7 percent of the Bureau's total case load.

We then determined the Bureau's operating costs for the period of our audit and calculated an estimate of the unallowable costs which related to the prosecution of claims against the Federal Government. Our calculations showed that the estimated amount of unallowable costs would not be material. Consequently, we did not pursue this issue further.

Although our estimate of the unallowable costs incurred by the Bureau for the prosecution of claims against the Federal Government were not significant in our audit period, we nevertheless believe that NYSDSS should discontinue claiming these costs to the Federal Government in the future.

Regarding the private law firm of Covington and Burling, we reviewed their contracts with NYSDSS. During our audit period this firm worked on two cases that were judicially appealed by NYSDSS. The law firm invoiced NYSDSS a total of \$253,109 for their services on the two cases. We traced their invoices to NYSDSS' claim and determined that the \$253,109 was charged to accumulator code 999 within the claim, which is a nonfederal account. Consequently, the Federal Government did not share in these costs.

The New York State Department of Law

The Affirmative Litigation Unit represents NYSDSS in matters which involve the prosecution of claims against the Federal Government through the judicial appeals process. For the period April 1, 1990 to March 31, 1995, NYSDOL incurred \$689,813 in legal

and administrative costs for the prosecution of claims against the Federal Government through the judicial appeals process. These costs are clearly unallowable for Federal reimbursement.

However, for the period April 1, 1990 to March 31, 1995, we noted that the DCA had negotiated a 50 percent exclusion of all costs claimed for reimbursement by NYSDOL through the SWCAP. The DCA negotiated the 50 percent exclusion because NYSDOL did not maintain an employee time reporting system as required by OMB Circular No. A-87. Specifically, Attachment B, section 10.b. which states that the " Salaries and wages of employees chargeable to more than one grant program or other cost objective will be supported by appropriate time distribution records. The method used should produce an equitable distribution of time and effort."

The DCA excluded approximately \$10 million dollars per year of NYSDOL's costs claimed through the SWCAP during our audit period. The excluded costs more than offset the unallowable costs of \$689,813 identified by our review. As a result, we are not recommending a financial adjustment on this review.

Memorandum of Understanding (MOU)

During our review, we became aware of an MOU between NYSDSS and NYSDOL. The MOU, dated September 28, 1993, provides for the annual transfer of up to \$1,000,000 of funds from NYSDSS to reimburse NYSDOL for litigation costs it incurs in the defense of Medicaid eligibility determinations. During our audit period, NYSDSS reimbursed NYSDOL a total of \$1,334,849 for services billed by NYSDOL under the MOU. And, NYSDSS claimed Federal reimbursement for the payments through its COCAC (HCFA 64).

In our opinion, the claiming by NYSDSS of NYSDOL's costs directly through the COCAC to the Federal Government circumvented the 50 percent exclusion which had been agreed to by DCA and the New York State Division of the Budget. Moreover, we believe the inclusion of NYSDOL's costs in the COCAC is contrary to cost principles contained in OMB Circular No. A-87. Specifically, section C 1.f. which states in part that " A cost may not be assigned to a Federal award as a direct cost if any other cost incurred for the same purpose in like circumstances has been allocated to the Federal award as an indirect cost." We determined that the costs that were allocated as a direct cost under the MOU and claimed under a Federal award were similar to the NYSDOL costs that were allocated indirectly through SWCAP and also claimed to the Federal Government. Finally, we interviewed several of the NYSDOL lawyers whose salary costs were allocated directly under the MOU. The attorneys advised us that they were not only defending Medicaid eligibility determinations but also defending the State in litigation brought by inmates of various correctional facilities. As a result, NYSDOL included

unallowable costs in its claim for reimbursement under the MOU. Based on the above, we are recommending an adjustment for the total NYSDOL claim of \$1,334,849 (\$593,174 Federal share).

Legal Costs Relating to Settlement Agreement

Paragraph 16 of the December 20, 1994 settlement agreement stated that:

"...all costs...incurred by or on behalf of the State of New York and its officers, directors, agents and employees in connection with..(iii) the State of New York's investigation, defense of the matter, and any Settlement Agreement...pursuant to this Settlement Agreement shall be unallowable costs for federal government reimbursement purposes, and shall not be included in claims submitted to the federal government. These amounts shall be separately accounted for by the State of New York by identification of costs incurred: 1) through accounting records to the extent that is possible; 2) through memorandum records including diaries and informal logs...where accounting records are not available...."

To comply with the terms of the settlement agreement, the State calculated an adjustment of \$328,519 which covered the period October 1, 1994 through June 30, 1995. Our review showed that the methodology used by NYSDSS to calculate this adjustment was reasonable.

Recommendations:

We recommend that NYSDSS:

- 1) Discontinue the future claiming to the Federal Government of legal and administrative costs incurred in the prosecution of claims against the Federal Government.
- 2) Refund \$593,174 to the Federal Government for improper claims identified under the MOU for the period April 1, 1993 to June 30, 1995.
- 3) Identify and return the Federal share of improper claims made under the MOU for periods subsequent to our audit period.

NYS COMMENTS

The State did not concur with our recommendation to refund \$593,174 to the Federal Government for improper claims identified under the MOU for the period April 1, 1993 to June 30, 1995. Also, the State did not comment on the report's recommendations to: discontinue the future claiming to the Federal Government of legal and administrative costs incurred in the prosecution of claims against the Federal Government; and, to

identify and return the Federal share of improper claims made under the MOU for periods subsequent to our audit period.

It was the State's position that claiming DOL's costs as direct costs under the MOU and eliminating them from the State-Wide Cost Allocation Plan (SWCAP) and, the 50 percent exclusion was allowable.

To support their position the State responded as follows:

1. There is no written agreement between DCA and DOL that states that all DOL costs must be included in the SWCAP and be subject to the exclusion. The 50 percent exclusion was allegedly established "...because DOL did not maintain an employee time reporting system as required by OMB Circular A-87".
2. The general requirements for a cost to be properly claimed as a direct cost are stated in OMB Circular No. A-87 and provides that direct costs are those that can be identified specifically with a particular cost objective. Therefore if DOL can demonstrate costs are direct costs, then the 50 percent exclusion would not apply. The State provided a detailed description of its methodology used to show that the total costs of services provided by the attorney's in the Bureau of Litigation, DOL for DSS meets or exceeds the costs claimed under the MOU. And, these services would cover any otherwise unallowable litigation costs.
3. Lastly, the State contends that DHHS's citation from OMB Circular No. A-87, section C 1.f.: "A cost may not be assigned to a Federal award as a direct cost if any other cost incurred for the same purpose in like circumstances has been allocated to the Federal award as an indirect cost." applies to all awards made on or after September 1, 1995 and is not applicable to this review.

OIG Response

We do not agree with the State's contention that it was allowable to claim DOL's costs as direct costs under the MOU and eliminate them from the SWCAP and, the 50 percent exclusion.

Regarding the lack of a written agreement between DCA and DOL that states that all DOL costs must be included in the SWCAP and be subject to the exclusion, we were advised by DCA that the first agreement that reflected the 50 percent exclusion was explained in a letter dated March 31, 1987 covering State fiscal years 1984 and 1985. The letter noted a reduction to the Department of Law costs and required NYS to develop time records or a statistic based on caseload data to allocate DOL costs in lieu of its quarterly estimates. The State has not implemented either and continued to voluntarily exclude the agreed to 50 percent of DOL costs.

Therefore, in our opinion without a time distribution system as required by OMB Circular No. A-87, the State can not determine the actual effort DOL provided to NYSDSS under the MOU for Medicaid eligibility determinations, which was the original basis for subjecting DOL costs to the 50 percent exclusion.

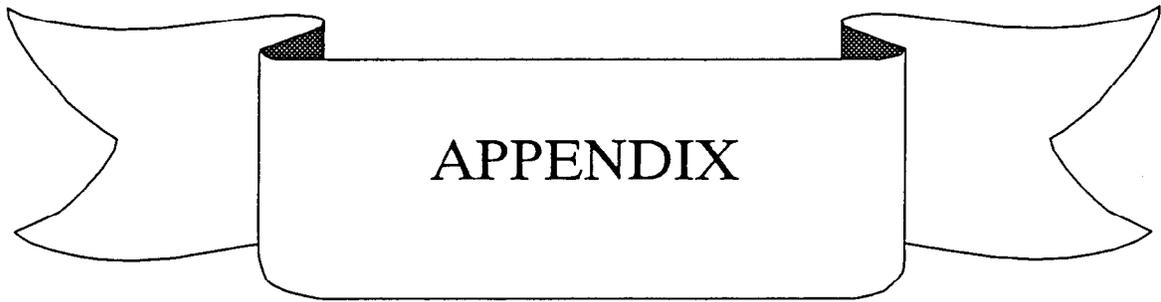
As to the State's contention that the DOL costs are allowable direct costs in that they can be identified specifically with a particular cost objective, it should be noted that the approved SWCAP for the audit period requires prior approval for accounting changes. Specifically, Section III of the SWCAP outlines the conditions that the State agreed to for amounts approved in Section I and the billings for the services listed in Section II. Condition B Accounting Changes states:

"This agreement is based on the accounting system purported by the State/locality to be in effect during the Agreement period. Changes to the method of accounting for costs which affect the amount of reimbursement resulting from the use of this Agreement require prior approval of the authorized representative of the Cognizant Agency. Such changes include, but are not limited to, changes in the charging of a particular type of cost from an allocated cost to a billed cost. Failure to obtain approval may result in cost disallowances."

The approved SWCAP included DOL costs as allocated costs. The State, without DCA approval, charged DOL costs under the MOU as billed costs. Consequently, the State did circumvent the 50 percent exclusion by not following the conditions of the approved SWCAP.

Although the citation in the latest version of OMB Circular No. A-87, "A cost may not be assigned to a Federal award as a direct cost if any other cost incurred for the same purpose in like circumstances has been allocated to the Federal award as an indirect cost" is not cited specifically in the prior OMB Circular No. A-87 version (January 1981), the basic rule that costs be accorded consistent treatment is stated. Specifically, Section C.1(e) under factors affecting allowability of costs states that to be allowable under a grant program, costs must meet the following general criteria: "Be accorded consistent treatment through application of generally accepted accounting principles." Also, section D.2 under composition of costs requires: "...that each item of cost be treated as a direct or an indirect cost." Consistency is a requirement to preclude the possibility of direct charging Federal programs for specific types of costs and allocating the same types of costs back to the Federal programs through the indirect cost allocation process. This would result in the overcharging of Federal Programs.

Therefore, we still recommend that NYSDSS refund \$593,174 to the Federal Government for improper claims identified under the MOU for the period April 1, 1993 to June 30, 1995 and identify and return the Federal share of improper claims made under the MOU for periods subsequent to our audit period.



APPENDIX



State of New York
Department of Health
Corning Tower, Empire State Plaza
Albany, New York 12237

BARBARA A. DEBUONO, M.D., M.P.H.
Commissioner

Phone: (518) 474-2011
Fax: (518) 474-5450

January 13, 1997

WHS/OIG
OFFICE OF AUDIT -
NEW YORK REGIONAL OFFICE

JAN 16 1997

RECEIVED

John Tournour
Regional Inspector General
for Audit Services
Department of Health and Human Services
Office of Inspector General
Office of Audit Services
Region II
Jacob K. Javits Federal Building
26 Federal Plaza
New York, New York 10278

Dear Mr. Tournour:

Enclosed are the Department of Health's comments on the Department of Health and Human Services draft report A-02-95-02006, entitled "Review of Legal and Administrative Costs Incurred by New York State Departments of Social Services and Law on Behalf of the New York State Department of Social Services".

Thank you for the opportunity to comment.

Very truly yours,

A handwritten signature in cursive script that reads "Barbara DeBuono".

Barbara A. DeBuono, M.D., M.P.H.
Commissioner of Health

enclosure

**Department of Health
Comments on the
Department of Health and Human Services
Draft Report A-02-95-02006 Entitled
"Review of Legal and Administrative
Costs Incurred by New York State
Departments of Social Services and Law
on Behalf of the New York State
Department of Social Services"**

The draft issued by the Department of Health and Human Services (DHHS) recommended that NYS DSS:

1. Discontinue claiming to the Federal Government legal and administrative costs incurred in the prosecution of claims against the Federal Government.
2. Refund \$593,174 to the Federal Government for improper claims identified under the MOU for the period April 1, 1993 to June 30, 1995.
3. Identify and return the Federal share of improper claims made under the MOU for periods subsequent to our audit period.

Since responsibility for this function was transferred from the New York State Department of Social Services (DSS) to the New York State Department of Health (DOH) effective October 1, 1996, the DOH's comments on DHHS' report are as follows:

- I. On page 6 of the report, DHHS sets forth the three bases for their findings that the State should return \$593,174 to the federal government. The first of these was their determination that "... the claiming by NYSDSS of DOL's costs directly through the COCAC to the Federal Government circumvented the 50 percent exclusion which had been agreed to by DCA and DOL".

Although it may be true that the claiming of the Department of Law's (DOL's) costs as direct costs had the effect of eliminating those costs from the State-Wide Cost Allocation Plan (SWCAP) and, thus, from the 50% exclusion, DHHS' assertion is not applicable. The general requirements for a cost to be properly claimed as a direct cost are stated in OMB's Circular A-87 (Circular), Attachment A, Section E, 1 and 2. That portion of the Circular provides that direct costs are those that can be identified specifically with a particular cost objective.

Further, there is no written agreement between the Division of Cost Allocation (DCA) and DOL that states that all of the costs of the DOL must be included in the SWCAP and be subject to the the exclusion. This 50% exclusion was allegedly

established "...because DOL did not maintain an employee time reporting system as required by OMB Circular A-87". However, if DOL can prove its costs as direct costs, then the 50% exclusion should be inapplicable.

The Department of Law intends to prove the costs it charged the Department of Social Services (DSS) under the Memorandum of Understanding (MOU) as follows:

Total all of the costs of services provided by the attorneys in the Bureau of Litigation, DOL for DSS, using DOL's Case Management Information System (CMIS) to identify DSS cases. These costs would include attorneys covered by the MOU and those that were not covered. The DOL believes that the total of these costs meets or exceeds the costs claimed under the MOU. In other words, the total costs for services provided to DSS by DOL was, at least, the full-time-equivalent (FTE) of the costs of the attorney services provided under the MOU.

A more detailed description of the methodology used by the DOL is contained in a letter (copy included as Attachment A) from Mr. Dan Dustin, Internal Audit Officer and Chief Accountant for DOL. Spreadsheets referenced in Mr. Dustin's letter have also been attached for your convenience.

- II. The second basis on page 6 is a quote from OMB Circular A-87 (Circular), Section C1.F: "A cost may not be assigned to a Federal award as a direct cost if any other cost incurred for the same purpose in like circumstances has been allocated to the Federal award as an indirect cost". These words follow the statement that, to be allowable, costs must be accorded consistent treatment and seem to be an explanation of that statement.

The quote is taken from OMB's Circular A-87 published May 17, 1995 at 60 F.R. 26484. Material on the effective date of the circular is set forth on page 26490. It provides that for costs, other than indirect costs, the Circular is to be applied to all awards made on or after September 1, 1995. As the period of this audit ends June 30, 1995, quotes from OMB Circular A-87 published on May 17, 1995 are not appropriate for consideration in this review.

Even assuming that the costs are properly considered indirect costs by DHHS, this version of the Circular is still inapplicable to this audit. For costs charged indirectly or covered by cost allocation plans, the May 17, 1995 version of the Circular is applied to cost allocation plans and indirect cost proposals submitted or prepared for the governmental unit's fiscal year that begins on or after September 1, 1995.

In New York, the fiscal year that begins on or after September 1, 1995 commences April 1, 1996. Therefore, this Circular is not applicable to this review.

The version of the Circular applicable to this audit was published at 46 F.R. 9548 on January 28, 1981. No provision containing the same or similar wording as the direct quotation provided by the auditors could be found therein. The corresponding provision in this Circular states that to be allowable costs must be accorded consistent treatment through application of generally accepted accounting principles appropriate to the circumstances.

Research reveals that, for the period of this audit, "consistent treatment of costs" does not have the meaning adopted in the 1995 version of the Circular and cited by DHHS, i.e., a cost may not be assigned as a direct cost if any other cost incurred for the same purpose in like circumstances has been allocated as an indirect cost. Generally, "inconsistent treatment of costs" refers to a grantee's treating federal funds in a manner inconsistent with the grantee's treatment of its own costs or other funding as noted in DAB Decision 821.

Further, DHHS cited no generally accepted accounting principle that prohibits claiming a cost as a direct cost when a cost incurred for an identical purpose was claimed as an indirect cost. Rather, it seems that the auditors relied solely on the citation in the 1995 Circular, which is inapplicable.

- III. The third and final basis for DHHS' recommendation that money be returned is that the auditors allegedly spoke to attorneys in the Bureau of the DOL covered by the MOU. According to the report, those attorneys advised the auditors that their responsibilities included defending the State in litigation brought by inmates of various correctional facilities. From that piece of information, the auditors concluded that DOL included unallowable costs in its claim,

The means used by the DOL to prove its direct costs under the MOU, the FTE methodology discussed above, excludes any otherwise unallowable costs.

ATTACHMENT A

Please note that the following letter and related schedules could not be legibly photocopied; therefore, it was scanned and reproduced, verbatim, as reflected below.

January 6, 1997

Ms. JoEllen Berger
Assistant Counsel
State of New York
Department of Health
40 North Pearl Street
Albany, New York 12207

Dear Ms. Berger:

The following is in response to your request for an update of the procedures followed in calculating the full time equivalents (FTE's) which verify that the Department of Law provided the necessary legal services to the Department of Social Services under the Memorandum of Understanding.

The analysis indicates that the attorneys claimed for reimbursement under the MOU had as their primary responsibility DSS casework and that the Bureau provided additional attorney resources as needed to provide the services reimbursed under the MOU.

All but one of the attorneys assigned to the MOU worked in the litigation bureau in New York City. This MOU attorney was assigned to the Albany litigation bureau. Due to the time constraints imposed in responding to the draft audit report, our analysis focused on the New York City bureau.

The OIG's concern appears to be centered on the non-DSS casework handled by the MOU attorneys. The analysis prepared by the Department of Law indicates that at least 81% of the attorney's time charged under the MOU was attributable to DSS casework. An analysis of the remaining casework in the DSS section of the litigation bureau reveals that the remaining DSS casework was handled by Department of Law non-MOU attorneys.

We focused our analysis on five months of case management reports distributed across the twenty-seven month period of the audit. We utilized monthly reports generated by the Department's case management information system (CMIS) which details the type of case handled by each attorney. The case work is broken down by the CMIS system into three categories: DSS, other agency, and non identified. The not identified category represents all case work not assigned to an agency when it was entered into the CMIS system by a keyboard operator. We reviewed the cases included in the not identified category and

re-cast the analysis based on our knowledge of the DSS personnel named as defendants in the not identified cases.

We identified the average caseload of the attorneys claimed under the MOU and compared it to the total caseload handled by the other attorneys included in the CMIS reports. The attorney and caseload statistics were detailed in the spreadsheet reports previously provided to you. The attached table summarizes our findings for the five months analyzed.

The table clearly indicates that the number of non-DSS cases handled by MOU attorneys is substantially less than the number of DSS cases handled by non-MOU attorneys. We performed further analysis to determine the additional attorneys needed to handle this case work.

We assumed that the average caseload for an MOU attorney is 51 cases (the lowest average for the five months analyzed), and divided this caseload into the DSS cases handled by non-MOU attorneys. This calculation revealed that at least five additional attorneys ($261 \text{ cases} / 51 \text{ caseload} = 5.12 \text{ FTE's}$) would be needed to handle these cases. In other words, even if the MOU attorneys spent 100% of their time on DSS matters, approximately three additional attorneys would be needed to handle the DSS caseload. The cost of hiring additional attorneys easily outweighs the costs attributable to the MOU attorneys providing non-DSS services.

The MOU attorneys performed approximately two FTE's of non-DSS casework (10 attorneys x 18.08%, June 1995). Based on the analysis provided, if the MOU attorneys worked 100% on DSS matters, three additional attorneys would still be needed to provide the necessary manpower to handle the DSS caseload. We believe that the vouchers submitted to DSS for payment are substantiated by this analysis.

Jack Madigan's argument was that the non-MOU attorneys were previously claimed under the SWCAP. While true, the argument fails to capture the benefit received by DSS and the federal government under the current practice. Had the MOU attorneys worked 100% on DSS cases and had DOL assigned three additional attorneys to the DSS section as deemed necessary by our analysis, the direct charges incurred under the MOU would have increased 30% (3 additional attorneys) or \$400,455 ($\$1,334,849 \times 30\%$), \$177,952 federal portion. Obviously, the entire argument hinges on the amount of amending of claims (SWCAP, DOL, vouchers, DSS vouchers) all parties deem necessary to resolve this matter.

As we discussed and as supported by the above analysis, the DSS section attorneys had as their primary responsibility Social Services' matters and the MOU provided that DSS would reimburse DOL for Social Services' legal proceedings.

If I can be of further assistance, please do not hesitate to contact me at (518) 473-7906.

Sincerely,

Daniel J. Dustin, CPA
Internal Audit Officer and
Chief Accountant

NEW YORK STATE DEPARTMENT OF LAW

Attorneys Charged Under the DSS MOU
April 1, 1993 Through June 30, 1995

Item #	Attorney Name	Period	Title	Per MOU at 8/12/93	4/1/93- 12/31/93	Supp. 10/1/93- 12/31/93	1/1/94- 3/31/94	4/1/94- 6/30/94	7/1/94- 9/30/94	10/1/94- 12/31/94	1/1/95- 3/31/95	4/1/95- 6/30/95
7002	Ann Marie Vanterpool William J. Toran	5/19/94-10/7/94 6/29/95-Present	Asst Atty Gen Asst Atty Gen			x	x	x	x	x		
7003	Douglas R. Israel	5/19/94-8/30/95	Asst Atty Gen				x	x	x	x		
7004	Carmen R. Torrent	5/23/94-Present	Asst Atty Gen				x	x	x	x		
7005	Glenn T. Marrow	5/19/94-9/6/95	Asst Atty Gen				x	x	x	x		
7006	Robert F. Bacigalupe	4/7/94-4/19/96	Asst Atty Gen	x			x	x	x	x		
7009	Richard Mathieu	4/7/94-Present	Asst Atty Gen				x	x	x	x		
7050	Lila Baboornian (Katchikian)	5/5/94-7/26/95	Legal Asst I				x	x	x	x		
7051	Judy E. Nathan	5/19/94-3/31/95	Asst Atty Gen	x			x	x	x	x		
7052	Kathleen P. Murray	6/29/95-Present	Asst Atty Gen				x	x	x	x		
7052	Robin C. Price	5/19/94-9/13/95	Asst Atty Gen				x	x	x	x		
7053	Gerald Slotnik	4/7/94-9/20/95	Asst Atty Gen	x			x	x	x	x		

3pp

for Schack

2pp

adjusted

2pp

New York State Department of Law
Case Management Information System Summary
June 1993

	Opened			DSS	Pending			Grand Total		
	DSS	Other	Total		NI	Other	Total	DSS	Total	% DSS
Slotnick	4	0	4	109	2	6	117	113	121	93.39%
Nathan	2	0	2	81	3	8	92	83	94	88.30%
Schack	0	0	0	43	16	6	65	43	65	66.15%
Baligalupi	3	1	4	46	6	8	60	49	64	76.56%
Schechter	5	1	6	108	4	16	128	113	134	84.33%
Vanterpool	0	0	0	8	0	0	8	8	8	100.00%
Price	0	0	0	10	0	2	12	10	12	83.33%
Subtotal	14	2	16	405	31	46	482	419	498	84.14%
Lahrff	1	0	1	13	0	0	13	14	14	100.00%
Israel	0	0	0	2	0	1	3	2	3	66.67%
Conolly	1	0	1	1	0	0	1	2	2	100.00%
Mathieu	2	1	3	43	4	8	55	45	58	77.59%
Esnard	0	1	1	9	3	2	14	9	15	60.00%
Younkins	0	1	1	4	1	0	5	4	6	66.67%
Cartmill	0	2	2	4	3	16	23	4	25	16.00%
Demchuk	0	1	1	57	4	12	73	57	74	77.03%
Kennedy	0	1	1	0	0	1	1	0	2	0.00%
Becker	0	0	0	2	0	0	2	2	2	100.00%
Bono	0	0	0	1	0	0	1	1	1	100.00%
Fuller	0	0	0	2	0	1	3	2	3	66.67%
Furman	0	0	0	8	1	7	16	8	16	50.00%
Hershler	0	0	0	1	0	1	2	1	2	50.00%
Kill	0	0	0	1	0	0	1	1	1	100.00%
Lewis	0	0	0	10	0	1	11	10	11	90.91%
Murray	0	0	0	2	0	0	2	2	2	100.00%
Meyer	0	0	0	0	2	1	3	0	3	0.00%
Osborne	0	0	0	17	0	1	18	17	18	94.44%
Pearman	0	0	0	7	0	3	10	7	10	70.00%
Susser	0	0	0	2	0	0	2	2	2	100.00%
Toran	0	0	0	2	0	0	2	2	2	100.00%
Torrent	0	0	0	2	0	0	2	2	2	100.00%
Weinberg	0	0	0	8	1	2	11	8	11	72.73%
Zegarowitz	0	0	0	8	1	3	12	8	12	66.67%
Matossepulveda	0	0	0	1	0	0	1	1	1	100.00%
Sanders	0	0	0	0	1	0	1	0	1	0.00%
Sidoti	0	0	0	0	1	6	7	0	7	0.00%
Stoliman	0	0	0	0	1	4	5	0	5	0.00%
Kierman	0	0	0	0	0	2	2	0	2	0.00%
Leong	0	0	0	0	0	2	2	0	2	0.00%
Lesch	0	0	0	0	0	1	1	0	1	0.00%
Popkin	0	0	0	0	0	1	1	0	1	0.00%
Wagner	0	0	0	0	0	1	1	0	1	0.00%
Not Identified	0	1	1	50	45	5	100	50	101	49.50%
Total Other	4	8	12	257	68	82	407	261	419	62.29%
Total	18	10	28	662	99	128	889	680	917	74.15%

New York State Department of Law
Case Management Information System Summary
January 1994

	Opened			DSS	NI	Pending			Grand Total		
	DSS	Other	Total			DSS	NI	Other	Total	DSS	Total
Slotnick	2	0	2	102	2	5	109	104	111	93.69%	
Nathan	1	0	1	83	1	7	91	84	92	91.30%	
Baligalupi	1	2	3	58	5	11	74	59	77	76.62%	
Schechter	2	0	2	89	2	13	104	91	106	85.85%	
Vanterpool	4	0	4	18	1	0	19	22	23	95.65%	
Price	0	0	0	11	0	4	15	11	15	73.33%	
Mathieu	1	0	1	48	2	12	62	49	63	77.78%	
Younkins	0	0	0	8	2	0	10	8	10	80.00%	
Torrent	0	0	0	3	0	1	4	3	4	75.00%	
Israel	3	0	3	6	0	1	7	9	10	90.00%	
Subtotal	14	2	16	426	15	54	495	440	511	86.11%	
Lahiff	0	0	0	14	0	0	14	14	14	100.00%	
Schack	0	0	0	48	14	6	68	48	68	70.59%	
Connolly	0	0	0	1	0	0	1	1	1	100.00%	
Esnard	1	1	2	25	3	4	32	26	34	76.47%	
Cartmill	0	0	0	2	4	19	25	2	25	8.00%	
Demchuk	0	0	0	41	3	12	56	41	56	73.21%	
Kennedy	0	0	0	0	0	2	2	0	2	0.00%	
Becker	0	0	0	2	0	0	2	2	2	100.00%	
Bono	0	0	0	1	0	0	1	1	1	100.00%	
Fuller	0	0	0	2	0	1	3	2	3	66.67%	
Furman	0	0	0	8	1	7	16	8	16	50.00%	
Hershler	0	0	0	1	0	1	2	1	2	50.00%	
Kill	0	0	0	1	0	0	1	1	1	100.00%	
Lewis	0	0	0	10	0	1	11	10	11	90.91%	
Murray	0	0	0	2	0	0	2	2	2	100.00%	
Meyer	0	0	0	0	2	1	3	0	3	0.00%	
Osborne	0	0	0	17	0	1	18	17	18	94.44%	
Pearman	0	0	0	7	0	3	10	7	10	70.00%	
Susser	0	0	0	2	0	0	2	2	2	100.00%	
Toran	0	0	0	3	0	0	3	3	3	100.00%	
Weinberg	0	0	0	8	1	2	11	8	11	72.73%	
Zegarowitz	0	0	0	8	1	3	12	8	12	66.67%	
Matossepulveda	0	0	0	1	0	0	1	1	1	100.00%	
Sanders	0	0	0	0	1	0	1	0	1	0.00%	
Sidoti	0	0	0	0	1	6	7	0	7	0.00%	
Stoliman	0	0	0	0	1	4	5	0	5	0.00%	
Kierman	0	0	0	0	0	2	2	0	2	0.00%	
Leong	0	0	0	0	0	2	2	0	2	0.00%	
Lesch	0	0	0	0	0	1	1	0	1	0.00%	
Popkin	0	0	0	0	0	1	1	0	1	0.00%	
Wagner	0	0	0	0	0	1	1	0	1	0.00%	
McLaughlin	a	0	0	0	0	0	0	0	0		
Mirabella	0	0	0	0	0	0	0	0	0		
Not Identified	0	2	2	60	53	5	118	60	120	50.00%	
Total Other	1	3	4	264	85	85	434	265	438	60.50%	
Total	15	5	20	690	100	139	929	705	949	74.29%	

New York State Department of Law
Case Management Information System Summary
June 1994

	Opened			DSS	Pending			Grand Total		
	DSS	Other	Total		NI	Other	Total	DSS	Total	% DSS
Slotnick	1	0	1	102	2	4	108	103	109	94.50%
Nathan	1	0	1	85	2	6	95	86	96	89.58%
Baligalopi	0	0	0	60	5	12	77	60	77	77.92%
Schechter	0	0	0	85	2	14	101	85	101	84.16%
Vanterpool	0	0	0	23	1	0	24	23	24	95.83%
Price	1	1	2	16	1	6	23	17	25	68.00%
Mathieu	1	0	1	55	3	11	69	56	70	80.00%
Younkins	0	0	0	8	2	1	11	8	11	72.73%
Torrent	1	0	1	5	0	2	7	6	8	75.00%
Israel	2	0	2	17	1	2	20	19	22	86.36%
Subtotal	7	1	8	456	19	60	535	463	543	85.27%
Lahiff	1	0	1	16	0	1	17	17	18	94.44%
Connolly	0	0	0	2	0	0	2	2	2	100.00%
Schack	0	0	0	47	15	6	68	47	68	69.12%
Esnard	0	1	1	28	3	7	38	28	39	71.19%
Cartmill	0	0	0	2	4	17	23	2	23	8.70%
Demchuk	0	0	0	28	2	12	42	28	42	66.67%
Kennedy	0	0	0	0	0	2	2	0	2	0.00%
Becker	0	0	0	3	0	0	3	3	3	100.00%
Bono	0	0	0	1	0	0	1	1	1	100.00%
Fuller	0	0	0	2	0	1	3	2	3	66.67%
Furman	0	0	0	8	1	7	16	8	16	50.00%
Hershler	0	0	0	1	0	1	2	1	2	50.00%
Kill	0	0	0	1	0	0	1	1	1	100.00%
Lewis	0	0	0	10	0	1	11	10	11	90.91%
Murray	1	0	1	4	0	0	4	5	5	100.00%
Meyer	0	0	0	0	2	1	3	0	3	0.00%
Osborne	0	0	0	17	0	1	18	17	18	94.44%
Pearman	0	0	0	7	0	3	10	7	10	70.00%
Susser	0	0	0	2	0	0	2	2	2	100.00%
Toran	0	0	0	3	0	0	3	3	3	100.00%
Weinberg	0	0	0	8	1	2	11	8	11	72.73%
Zegarowitz	0	0	0	7	1	3	11	7	11	63.64%
Matossepulveda	0	0	0	2	0	0	2	2	2	100.00%
Sanders	0	0	0	0	1	0	1	0	1	0.00%
Sidoti	0	0	0	0	1	6	7	0	7	0.00%
Stollman	0	0	0	0	1	4	5	0	5	0.00%
Kierman	0	0	0	0	0	2	2	0	2	0.00%
Leong	0	0	0	0	0	2	2	0	2	0.00%
Lesch	0	0	0	0	0	1	1	0	1	0.00%
Popkin	0	0	0	0	0	1	1	0	1	0.00%
Wagner	0	0	0	0	0	1	1	0	1	0.00%
McLaughlin	0	0	0	0	0	0	0	0	0	
Mirabella	0	0	0	0	0	0	0	0	0	
Not Identified	4	1	5	73	56	6	135	77	140	55.00%
Total Other	6	2	8	272	88	88	448	278	456	60.96%
Total	13	3	16	728	107	146	983	741	999	74.17%

New York State Department of Law
Case Management Information System Summary
January 1995

	Opened		Total	DSS	Pending		Total	Grand Total		
	DSS	Other			NI	Other		DSS	Total	% DSS
Slotnick	1	0	1	97	2	5	104	98	105	93.33%
Nathan	0	0	0	87	2	8	97	87	97	89.69%
Baligalupi	1	0	1	62	4	12	78	63	79	79.75%
Schechter	1	2	3	84	2	17	103	85	106	80.19%
Vanterpool	0	0	0	24	1	0	25	24	25	96.00%
Price	0	0	0	25	1	8	34	25	34	73.53%
Mathieu	1	0	1	50	5	12	67	51	68	75.00%
Younkins	0	0	0	8	2	2	12	8	12	66.67%
Torrent	0	0	0	11	1	4	16	11	16	68.75%
Israel	1	0	1	25	0	7	32	26	33	78.79%
Subtotal	5	2	7	473	20	75	568	478	575	83.13%
Lahiff	0	0	0	18	0	1	19	18	19	94.74%
Connolly	0	0	0	3	0	1	4	3	4	75.00%
Schack	0	0	0	46	15	6	67	46	67	68.66%
Esnard	1	0	1	30	3	8	41	31	42	73.81%
Cartmill	0	0	0	2	4	17	23	2	23	8.70%
Demchuk	0	0	0	10	2	12	24	10	24	41.67%
Kennedy	0	0	0	0	0	2	2	0	2	0.00%
Becker	0	0	0	7	1	1	9	7	9	77.78%
Bono	0	0	0	7	0	0	7	7	7	100.00%
Fuller	0	0	0	2	0	1	3	2	3	66.67%
Furman	0	0	0	8	1	7	16	8	16	50.00%
Hershler	0	0	0	1	0	1	2	1	2	50.00%
Kill	0	0	0	1	0	0	1	1	1	100.00%
Lewis	1	0	1	11	0	1	12	12	13	92.31%
Murray	0	0	0	7	0	0	7	7	7	100.00%
Meyer	0	0	0	0	2	1	3	0	3	0.00%
Osborne	0	0	0	12	0	1	13	12	13	92.31%
Pearman	0	0	0	7	0	3	10	7	10	70.00%
Susser	0	0	0	2	0	0	2	2	2	100.00%
Toran	0	0	0	3	1	0	4	3	4	75.00%
Weinberg	0	0	0	8	1	2	11	8	11	72.73%
Zegarowitz	0	0	0	7	1	3	11	7	11	63.64%
Matosseputveds	2	1	3	11	0	2	13	13	16	81.25%
Sanders	0	0	0	0	1	0	1	0	1	0.00%
Sidoti	0	0	0	0	1	6	7	0	7	0.00%
Stollmen	0	0	0	0	1	4	5	0	5	0.00%
Kierman	0	0	0	0	0	2	2	0	2	0.00%
Leong	0	0	0	0	0	2	2	0	2	0.00%
Lesch	0	0	0	0	0	1	1	0	1	0.00%
Popkin	0	0	0	0	0	1	1	0	1	0.00%
Wagner	0	0	0	0	0	1	1	0	1	0.00%
McLaughlin	0	0	0	0	0	1	1	0	1	0.00%
Not Identified	0	0	0	73	64	6	143	73	143	51.05%
Total Other	4	1	5	276	98	94	468	280	473	59.20%
Total	9	3	12	749	118	169	1036	758	1048	72.33%

New York State Department of Law
Case Management Information System Summary
June 1995

	Opened			DSS	Pending			Grand Total		
	DSS	Other	Total		NI	Other	Total	DSS	Total	% DSS
Slotnick	1	0	1	79	2	5	86	80	87	91.95%
Nathan	0	0	0	78	2	6	86	78	86	90.70%
Baligalupi	1	1	2	50	4	8	62	51	64	79.69%
Schecher	0	0	0	80	2	17	99	80	99	80.81%
Vanterpool	0	0	0	18	1	0	19	18	19	94.74%
Price	0	0	0	30	1	8	39	30	39	76.92%
Mathieu	1	1	2	55	7	14	76	56	78	71.79%
Younkins	0	0	0	10	2	2	14	10	14	71.43%
Torrent	1	0	1	18	1	6	25	19	26	73.08%
Israel	0	0	0	31	1	9	41	31	41	75.61%
Subtotal	4	2	6	449	23	75	547	453	553	81.92%
Lahiff	0	0	0	23	0	1	24	23	24	95.83%
Connolly	0	0	0	3	0	1	4	3	4	75.00%
Schack	0	0	0	43	15	5	63	43	63	68.25%
Esnard	0	0	0	29	3	8	40	29	40	72.50%
Cartmill	0	0	0	1	4	17	22	1	22	4.55%
Demchuk	0	0	0	7	2	11	20	7	20	35.00%
Kennedy	0	0	0	0	0	2	2	0	2	0.00%
Becker	0	0	0	8	1	2	11	8	11	72.73%
Bono	0	0	0	1	0	0	1	1	1	100.00%
Fuller	0	0	0	2	0	1	3	2	3	66.67%
Furman	0	0	0	8	1	7	16	8	16	50.00%
Hershler	0	0	0	2	0	1	3	2	3	66.67%
Kill	0	0	0	1	0	0	1	1	1	100.00%
Lewis	0	0	0	12	0	1	13	12	13	92.31%
Murray	5	0	5	20	1	1	22	25	27	92.59%
Meyer	0	0	0	0	2	1	3	0	3	0.00%
Osborne	0	0	0	11	0	1	12	11	12	91.67%
Pearman	0	0	0	7	0	3	10	7	10	70.00%
Susser	0	0	0	2	0	0	2	2	2	100.00%
Toran	2	2	4	5	3	0	8	7	12	58.33%
Weinberg	0	0	0	8	1	2	11	8	11	72.73%
Zegarowitz	0	0	0	7	1	3	11	7	11	63.64%
Matoseepulveda	2	0	2	18	1	4	23	20	25	80.00%
Sanders	0	0	0	0	0	0	0	0	0	
Sidoti	0	0	0	0	1	6	7	0	7	0.00%
Stollman	0	0	0	0	1	4	5	0	5	0.00%
Kierman	0	0	0	0	0	2	2	0	2	0.00%
Leong	0	0	0	0	0	2	2	0	2	0.00%
Lesch	0	0	0	0	0	1	1	0	1	0.00%
Popkin	0	0	0	0	0	1	1	0	1	0.00%
Wagner	0	0	0	0	0	1	1	0	1	0.00%
McLaughlin	0	0	0	1	0	1	2	1	2	50.00%
Mirabelia	1	2	3	1	2	1	4	2	7	28.57%
Not Identified	0	0	0	77	63	6	146	77	146	52.74%
Total Other	10	4	14	297	102	97	496	307	510	60.20%
Total	14	6	20	746	125	172	1043	760	1063	71.50%